

§ 331.3

33 CFR Ch. II (7–1–01 Edition)

has previously been furnished to the Corps district office. The affected party initiates the administrative appeal process by providing an acceptable RFA to the appropriate Corps of Engineers division office. An acceptable RFA contains all the required information and provides reasons for appeal that meets the criteria identified in § 331.5.

Review officer (RO) means the Corps official responsible for assisting the division engineer or higher authority responsible for rendering the final decision on the merits of an appeal.

Tolling agreement refers to a document signed by any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact (ATF) permit, where the application is accepted and evaluated by the Corps. The agreement states that the affected party agrees to have the statute of limitations regarding any violation associated with that approved JD or application “tolled” or temporarily set aside until one year after the final Corps decision, as defined at § 331.10. No ATF permit application or administrative appeal associated with an unauthorized activity will be accepted until a tolling agreement is furnished to the district engineer.

§ 331.3 Review officer.

(a) *Authority.* (1) The division engineer has the authority and responsibility for administering a fair, reasonable, prompt, and effective administrative appeal process. The division engineer may act as the review officer (RO), or may delegate, either generically or on a case-by-case basis, any authority or responsibility described in this part as that of the RO. With the exception of JDs, as described in this paragraph (a)(1), the division engineer may not delegate any authority or responsibility described in this part as that of the division engineer. For approved JDs only, the division engineer may delegate any authority or responsibility described in this part as that of the division engineer, including the final appeal decision. In such cases, any delegated authority must be granted to an official that is at the same or higher grade level than the grade level of the official that signed the approved

JD. Regardless of any delegation of authority or responsibility for ROs or for final appeal decisions for approved JDs, the division engineer retains overall responsibility for the administrative appeal process.

(2) The RO will assist the division engineer in reaching and documenting the division engineer’s decision on the merits of an appeal, if the division engineer has delegated this responsibility as explained in paragraph (a)(1) of this section. The division engineer has the authority to make the final decision on the merits of the appeal. Neither the RO nor the division engineer has the authority to make a final decision to issue or deny any particular permit nor to make an approved JD, pursuant to the administrative appeal process established by this part. The authority to issue or deny permits remains with the district engineer. However, the division engineer may exercise the authority at 33 CFR 325.8(c) to elevate any permit application, and subsequently make the final permit decision. In such a case, any appeal process of the district engineer’s initial decision is terminated. If a particular permit application is elevated to the division engineer pursuant to 33 CFR 325.8(c), and the division engineer’s decision on the permit application is a permit denial or results in a declined permit, that permit denial or declined permit would be subject to an administrative appeal to the Chief of Engineers.

(3) *Qualifications.* The RO will be a Corps employee with extensive knowledge of the Corps regulatory program. Where the permit decision being appealed was made by the division engineer or higher authority, a Corps official at least one level higher than the decision maker shall make the decision on the merits of the RFA, and this Corps official shall appoint a qualified individual as the RO to conduct the appeal process.

(b) *General—(1) Independence.* The RO will not perform, or have been involved with, the preparation, review, or decision making of the action being appealed. The RO will be independent and impartial in reviewing any appeal, and when assisting the division engineer to make a decision on the merits of the appeal.

(2) *Review.* The RO will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA. In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially promulgated Corps policy guidance have been satisfied. Should the RO require expert advice regarding any subject, he may seek such advice from any employee of the Corps or of another Federal or state agency, or from any recognized expert, so long as that person had not been previously involved in the action under review.

§ 331.4 Notification of appealable actions.

Affected parties will be notified in writing of a Corps decision on those activities that are eligible for an appeal. For approved JDs, the notification must include an NAP fact sheet, an RFA form, and a basis of JD. For permit denials, the notification must include a copy of the decision document for the permit application, an NAP fact sheet and an RFA form. For proffered individual permits, when the initial proffered permit is sent to the applicant, the notification must include an NAO fact sheet. For declined permits (i.e., proffered individual permits that the applicant refuses to accept and sends back to the Corps), the notification must include an NAP fact sheet and an RFA form. Additionally, an affected party has the right to obtain a copy of the administrative record.

§ 331.5 Criteria.

(a) *Criteria for appeal*—(1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at § 331.2) to the appropriate division office in order to appeal an approved JD, a permit denial, or a declined permit. An individual permit that has been signed by the applicant, and subsequently unilat-

erally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of an approved JD, a permit denial, or a declined permit must be specifically stated in the RFA and must be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: A procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR Part 230); or use of incorrect data. The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved JD was appealed.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under this part if it falls into one or more of the following categories:

(1) An individual permit decision (including a letter of permission or a standard permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all rights to appeal the terms and conditions of the permit, unless the authorized work has not started in waters of the United States and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7;

(2) Any site-specific matter that has been the subject of a final decision of the Federal courts;

(3) A final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision;